

Iowa Department of Justice
Attorney General Thomas J. Miller

Iowa Secretary of State
Secretary of State Chester J. Culver

October 28, 2004

Dear County Officials:

As election day approaches, legal battles over counting provisional ballots cast in the wrong precinct but right county have been fought and continue to be fought in States across the country. Last week the Attorney General issued legal advice to the Secretary of State that these provisional ballots should be counted in Iowa for federal offices. At that time, there had been litigation in at least five States over this issue, and the courts were split on whether or not these votes could be counted. However, two days ago a three-member panel of the Sixth Circuit Court of Appeals reversed two federal district court cases from Ohio and Michigan that had been the cases which supported our position. Additional judicial decisions across the country are very likely. Other cases could go the other way from the Sixth Circuit decision. It is now clear that this question will not be finally resolved in Iowa before the election. There is not sufficient time for the case to reach the Iowa Supreme Court and the United States Supreme Court. Rather, if necessary, finality will come only in decisions rendered from an election contest subsequent to the election. The election is only a few days away and the time has come to instruct you on how to handle these provisional ballots.

In compliance with the Help America Vote Act, every voter who wants a provisional ballot should be permitted to cast such a ballot. After the votes are cast, you should segregate from all other provisional ballots, provisional ballots cast by voters who were eligible and registered to vote in the right county yet cast their vote in the wrong precinct. It is of the utmost importance that you segregate and maintain separately the provisional votes that are clearly valid but for being cast in the wrong precinct. The candidates and voters then have a clear opportunity to litigate this important question, if necessary, and with your work the result will be clear to the parties and the public depending on the resolution of the legal question.

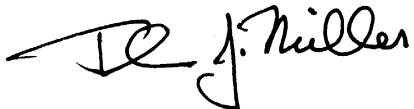
We are instructing that you not count the provisional votes cast in the wrong precinct. While we continue to believe that the federal law should be interpreted to allow the counting of those votes, your best course of action under the current circumstances is to follow the consistent decisions of three federal courts and not officially count these votes.

Should these provisional ballots prove to be sufficient in number to possibly affect the outcome of the election of the President, or another federal official, in Iowa the candidates may file an election contest under Iowa law in which the legality of counting or rejecting these votes can be determined. See Iowa Code Chp. 57, 60 (2003). We continue to believe that the Help America Vote Act requires provisional ballots cast in the wrong precinct to be counted as outlined in the Attorney General's letter to Secretary Culver on October 22, 2004. We reserve the right to assert in court that a provisional ballot for President and other federal offices should be counted when the voter casts the ballot in the wrong precinct but the correct county.

We continue to emphasize very strongly that the best practice is to direct voters to the correct polling place. This maximizes voter participation. Voters then can be assured that – no matter how the courts finally construe the Help America Vote Act – each voter will have the opportunity to cast a vote for every office and upon every public question that voter is eligible to determine. To that end, we will work to assure that every voter is directed to the correct polling place.

This election is crucial to voters in Iowa and across our country. And every vote counts. The enclosed instructions represent our best direction to you today with the recognition that this issue has not been finally resolved.

Sincerely,

A handwritten signature in black ink, appearing to read "T. J. Miller", with a stylized flourish at the end.

Thomas J. Miller
Iowa Attorney General

Sincerely,

A handwritten signature in black ink, appearing to read "Chester Culver", with a long, sweeping horizontal flourish at the end.

Chester J. Culver
Iowa Secretary of State

Precinct Worker Guide

Absentee and Special Voters' Precinct

Rejecting Provisional Ballots

The Board shall reject a provisional ballot for the following reasons:

1. Voter cast an absentee ballot. If the absentee ballot was counted, do not count the provisional ballot. [53.19]

2. Voter is not properly registered to vote.

The Board shall reject the ballot if the person who cast the ballot is not properly registered to vote. Reasons include:

- a. The voter is not registered to vote in this county. [48A.5(1)]
- b. The person voted outside the precinct where the voter lives. Precinct means the geographic area around the voter's residence, not the whole county. **These ballots must be stored separately. See below.**[49.9; 53.25; IAC 721—21.361(2)]
- c. Registration status is "inactive" and the applicant failed to provide required ID at the polls and by the time the Board convened. [721—21.301]
- d. Registration status is "pending identification" and the applicant failed to provide required ID documents at the polls and by the time the Board convened. [821—2.14(3)]
- e. Registration status is "pending verification" and the applicant's ID number could not be verified before the canvass and the voter did not reregister in person before the close of registration for the election. [821—2.15]

3. Person is not qualified to vote, because he or she is:

- a. Not yet 18 years old.
- b. Not a US citizen.
- c. Currently judged mentally incompetent to vote.
- d. A convicted felon whose voting rights have not been restored.

4. Voted at polls. The Board shall reject the ballot if the person voted at the polls on election day. [721—21.361(6)]

Reason for rejecting ballot. Write the reason for rejecting the ballot on the provisional ballot envelope.

Keep a list of the reasons ballots were rejected and the number of ballots in each group. Be specific. For example: "Registration inactive, no registration form."

Keep rejected provisional ballots separate.

2004 General Election: Separately store ballots rejected because the person voted "outside precinct where voter lives." (Reason 2b above.) Do not store them with other rejected provisional ballots.

Do not open the sealed provisional ballot envelopes containing ballots that will not be counted. Label the envelope with the name and date of the election. Store rejected ballots separate from the ballots that have been accepted for counting.

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Preserve the rejected provisional ballots in the sealed envelopes for twenty-two months for federal elections and for six months after other elections. [50.26, IAC 721—21.359(2)]

Absentee ballots received after Election Day

The special precinct board shall also review the affidavits of any absentee ballots received after Election Day and before the deadline for their return. The Board shall follow the standards on pages 12-13 for rejecting absentee ballots and shall also count any absentee ballots accepted. They may need to meet on canvass day to complete their tally of these absentee ballots. [50.22]

No postmark on return envelope: If there is no postmark on the return carrier envelope, or if the postmark is illegible, the Board shall open the return carrier envelope. If the date on the affidavit envelope is the day before the election or earlier, then the ballot is considered to be on time. If there is no date, or it is dated on election day or later, or the date is illegible, the ballot cannot be counted.

Sample forms for challenges. The forms used by challenged voters and challengers appear on the following pages.